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Attorneys for Defendant

IN THE SUPERIOR COURT OF THE STATE OF ARIZONA
IN AND FOR THE COUNTY OF YAVAPAI

STATE OF ARIZONA

Plaintiff,

vs.

STEVEN CARROLL DEMOCKER,

Defendant.

No. CR 2008-1339

Division 6

**REPLY TO STATE'S RESPONSE
TO DEFENDANT'S MOTION TO
DISMISS THE DEATH PENALTY
NOTICE FOR LACK OF
PROBABLE CAUSE OR, IN THE
ALTERNATIVE, FOR A
PROBABLE CAUSE HEARING
ON THE STATE'S NOTICED
AGGRAVATING
CIRCUMSTANCES, AND
REQUEST FOR SANCTIONS**

Pursuant to Rules 1.3(a) and 35.1(a) of the Arizona Rules of Criminal Procedure,
due process, and the Arizona and U.S. Constitutions, Defendant Steven DeMocker
requests that this Court strike the State's untimely response to his Motion to Dismiss the
Death Penalty Notice for lack of probable cause, and as a result, grant the relief
requested therein, and to thereafter enter an Order precluding the use by the State of any

SUPERIOR COURT
2009 SEP 21 AM 10:32
JEANNE THONG, CLERK
BY: Heather Figueroa

1 undisclosed or late-disclosed evidence or material in any pleading or proceeding in this
2 case. This Reply is supported by the following Memorandum and Points of Authorities.

3 **BACKGROUND**

4 On August 25, 2009, the Defendant filed a Motion to Dismiss the Death Penalty
5 Notice For Lack of Probable Cause, Or In The Alternative, For a Probable Cause
6 Hearing (the "Motion to Dismiss"). A hearing on that motion was set in open court on
7 that date for September 22, 2009. Service of that motion on the State was by first-class
8 mail addressed to the Yavapai County Attorney. Pursuant to Rule 1.3(a), Rules of
9 Criminal Procedure, the State's response was due on or before September 9, 2009. No
10 response was filed by that date, nor did the State contact defense counsel to request an
11 extension, nor was a motion to enlarge time to respond filed before the September 9
12 deadline. Instead, on September 16, 2009, a full week after the response was due, the
13 State filed a pleading asking for leave to file a "delayed response" without specifying
14 how much delay they sought, citing a need for more evidence.

15 **ARGUMENT**

16 It is clear that when no response to a motion is filed, the motion is deemed
17 submitted on the record before the Court. Rule 1.3(a), Rules of Criminal Procedure.
18 Here, the State has offered no reasonable explanation for their failure to file anything at
19 all by the September 9 deadline, including even a motion to enlarge time for their
20 response, nor can they claim to have contacted defense counsel at any time prior to their
21 September 16 filing.¹ When they eventually did respond, a week late, the State then
22 asked the Court for leave to file a "delayed response" to some unspecified future date,
23 because they were still waiting for information from their forensic accountant, which in
24
25

26 ¹ In fact, counsel undersigned sent an e-mail to the County Attorney early on September 16 inquiring as to whether
27 there was a problem regarding their failure to file, which was never answered.

1 turn was somehow delayed because of the alleged failure of Defendant's former
2 employer UBS to respond to a records subpoena issued in April of this year.

3 From the State's own response, the Court can see that UBS was served the
4 subject subpoena on April 16, 2009, and responded fully on May 18, 2009. Now, four
5 (4) months later, the State for the first time claims in court that (a) the UBS information
6 is somehow critical to their ability to respond to the Motion to Dismiss, and (b) that
7 UBS is not being cooperative in providing documents. Of course, the State is and was
8 subject to the June 22, 2009 discovery cut-off imposed by this Court, and their failure to
9 promptly address a problem they must have known existed on May 18 until three (3)
10 months after the discovery cutoff is both inexcusable and inexplicable under the
11 circumstances. In short, the State ignored a deadline to respond to the first substantive
12 motion challenging the applicability of the death penalty in this case, then attempted
13 after the fact to construct an excuse for their failure that asks this Court to believe that
14 documents about which they did nothing for four months have suddenly become so
15 important to their defense on this motion that the entire process should be delayed
16 indefinitely while they litigate with UBS. Meanwhile, Defendant sits in jail, while the
17 State essentially concedes that without more evidence they cannot show probable cause
18 on the death penalty aggravators.²

19 Defendant has become increasingly concerned that situations such as this will
20 become commonplace, given that the State has seemed thus far to routinely ignore the
21 June 22 discovery cutoff and other deadlines imposed by rule, as they have in this
22 particular proceeding. For example, the State has not yet disclosed a single word from
23 its forensic accountant, its crime scene and blood spatter expert or its forensic
24 photography expert, despite the passing of the discovery cutoff three months ago. In
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26
27 ² The ethical implications of filing a death penalty notice without first having evidence of probable cause are, to
28 put it mildly, staggering.

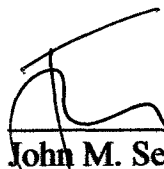
1 order to keep this case on track for trial next May, this Court must make it clear that the
2 State will not be allowed to use, either in pleadings or otherwise, late-disclosed or
3 undisclosed evidence or other material. Such an order would, in Defendant's view, put
4 a stop to the State's practice of ignoring deadlines and insure that this case will proceed
5 in a fair, speedy and orderly way to a just result.
6

7 8 **CONCLUSION**

9 The State failed, without good cause or prior leave of this Court, to timely
10 respond to the Defendant's critically important Motion to Dismiss the Death Penalty
11 Notice in this case. Accordingly, pursuant to Rule 35.1(a), the motion is deemed
12 submitted on the record before the Court, and should therefore be granted. Further, in
13 order to prevent this situation from re-occurring, this Court should enter an Order
14 confirming the June 22, 2009 discovery cut-off for the State and precluding the use by
15 the State in any pleading or proceeding of any undisclosed or late-disclosed evidence or
16 material.

17 DATED this 21st day of September, 2009.

18
19
20 By:


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28 Attorneys for Defendant

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2 ORIGINAL of the foregoing filed
3 this 21st day of September, 2009, with:

4 Jeanne Hicks,
5 Clerk of the Superior Court
6 Yavapai County Superior Court
7 120 S. Cortez
8 Prescott, AZ 86303

9 COPIES of the foregoing hand delivered
10 this 21st day of September, 2009, to:

11 The Hon. Thomas B. Lindberg
12 Judge of the Superior Court
13 Division Six
14 120 S. Cortez
15 Prescott, AZ 86303

16 and

17 Joseph C. Butner III, Esq.
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19 3505 W. Highway 260
20 Camp Verde, AZ 86322

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